# No. 8094

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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THAMAN SINGH,

*Appellant,*

vs.

EDWARD L. HAFF, District Director of Immigration and Naturalization for the Port of San Francisco,

*Appellee.*

## BRIEF FOR APPELLANT.

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## Subject Index



## Table of Authorities Cited

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## BRIEF FOR APPELLANT.

### STATEMENT OF THE CASE.

This is an appeal from an order of the lower court denying the petition for a writ of habeas corpus. Upon the hearing before the lower court the original records of the Immigration Service were introduced in evidence and marked Respondent's Exhibits "A" and "B", thus presenting the entire record before the court.

The alien, Thaman Singh, is a British subject, born in the province of Punjab, India. He has been ordered deported by the Secretary of Labor on the

grounds that he is in the United States in violation of the Immigration Act of 1924 in that: (1) At the time of entry he was not in possession of an immigration visa, and (2) he is an alien ineligible to citizenship and is not exempted by paragraph (c), Section 13 of said Act (8 U. S. C. A. Sec. 213 (a) and (c)), Respondent's Exhibit "A", pages 8, 9, 10, 11 and 12.

The sole issue involved in the case is the question of fact as to whether or not appellant last entered the United States prior to July 1, 1924 (the effective date of the Immigration Act of 1924, supra). If he entered this country on or after this date he is now subject to deportation under the provisions of said Act (8 U. S. C. A. Sec. 214). If, however, his last entry occurred prior to July 1, 1924, his deportation would be barred by the five-year limitation contained in the Immigration Act of 1917 (8 U. S. C. A. Sec. 155).

The alien claims to have arrived at the port of Seattle, Washington, February 29, 1912, on the S.S. "Minnesota", and was landed by immigration officials March 4, 1912, and that he has ever since remained in the United States. The alien was taken into custody by immigration officials at San Francisco on June 7, 1934, under Department warrant dated April 7, 1934. The application for the warrant of arrest was based on the ex parte statements of five Mexicans, who, through a photograph exhibited to them at Calexico, California, pretended to identify this alien as a person they had seen in Mexico subsequent to July 1, 1924.

It is conceded by the immigration officials that the alien was the person who entered the United States lawfully on the aforesaid date, but that subsequent thereto he left the United States and later on re-entered after July 1, 1924 (Respondent's Exhibit "A", p. 93).

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**SPECIFICATIONS OF ERROR.**

First: That the court erred in holding that there was substantial evidence before the immigration authorities to justify the conclusion that the appellant was unlawfully in the United States.

Second: That the court erred in holding that the evidence submitted before the immigration authorities was of sufficient weight and legality to warrant the conclusion that the appellant, after having once lawfully resided in the United States, departed therefrom, and therefore forfeited his right to remain therein.

Third: That the court erred in holding that the appellant was accorded a full and fair hearing before the immigration authorities.

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**ARGUMENT.**

The alien claims that he arrived at Seattle, Washington, on the S.S. "Minnesota" on February 29, 1912, and that he was landed by the immigration officers on March 4, 1912. The government has offered in evidence Exhibit "J", Form 505 (Respondent's Exhibit

"A", p. 115), in the name of Thaman Singh, who arrived at the port of Seattle on the S.S. "Minnesota" February 28, 1912. The alien claims this is his arrival record. He also presented two witnesses, Kushia Singh (Respondent's Exhibit "A", pp. 41 to 45), and Pakhar Gundo (Mehian Singh) (Respondent's Exhibit "A", pp. 45 to 52), who arrived on the same boat with him (the official records confirm such arrival), and these witnesses positively identify this alien as having arrived at that time. The examining inspector says (Respondent's Exhibit "A", p. 93):

> "It is reasonable to presume that this (arrival record, Exhibit J) does actually pertain to this alien. However, although it is believed that the alien actually did enter the United States as claimed in the year 1912, it is also believed that he did not remain in the United States for any length of time."

It is our contention that where an alien has shown conclusively that he did legally enter the United States many years ago, and has positively and consistently testified that he has ever since remained in the United States, the burden of attack to show that he is now illegally here is on the government.

*Wong Yee Toon v. Stump* (C. C. A. 4th), 233 Fed. 194;

*Ng Fung Ho et al. v. White* (C. C. A. 9th), 266 Fed. 765;

*U. S. v. Moy Nom,* 249 Fed. 772;

*Choy Yuen Chan v. U. S.,* 30 Fed. (2) 516;

*In re Lum You,* 262 Fed. 451;

*In re Lee Hung Wong,* 29 Fed. (2) 768.

The government has offered nothing except suspicion and conjecture based on illegal and incompetent documents. It appears that the courts have uniformly held that there must be evidence, legal evidence, to support the charges contained in a warrant of arrest in deportation proceedings. Apparently a very large majority of the courts hold that there must be substantial evidence in a proceeding of this kind, and that whether there is any substantial evidence presented in support of the charge in deportation proceedings is a question of law reviewable by the courts.

*Backus v. Owe Sam Goon,* 235 Fed. 847;
*Lisotta v. U. S.,* 3 Fed. (2) 108;
*Mantler v. Commissioner of Immigration,* 3 Fed. (2) 234;
*Svarney v. U. S.,* 7 Fed. (2) 515 (C. C. A. 8th); and
8 U. S. C. A., pages 240 to 242, note 168.

The examining inspector (Respondent's Exhibit "A", p. 93) expresses the opinion that this alien left the United States a few years after his arrival and resided a number of years in Mexico. There is no basis for this opinion except the ex parte statements of five Mexicans who, through a photograph exhibited to them at Calexico, California, alleged that the alien was a person they had seen in Mexico subsequent to July 1, 1924. The inclusion in the record of this case of the ex parte statements of these five Mexicans constituted an unfair hearing. These statements were taken by an immigration inspector prior to the alien's arrest; the alien was not present at the time the statements were taken; he was not represented by counsel

or otherwise at the time; said witnesses were not produced by the government for cross-examination, and the alien's attorney had no opportunity to cross-examine them. The only offer on behalf of the government to present these witnesses for cross-examination was at Calexico, California, nearly 500 miles away from the alien's place of residence and where he was unable to appear with his attorney because of his financial condition (Respondent's Exhibit "A", pp. 82, 83, 85). It was therefore moved, for the reasons set forth, that the ex parte statements of the Mexican witnesses be suppressed and stricken from the record and completely eliminated from any consideration as evidence in the case.

In the case of *Ungar v. Seaman*, 4 Fed. (2) 80 (C. C. A. 8th), where certain ex parte statements had been incorporated in the record, the court said:

> "The introduction in evidence against the accused of the reports and affidavits of the officers who conducted these secret examinations of the contents of these unfair and unjust examinations violated the indispensible requirements of a fair trial, that the witnesses against the accused shall confront them and give the latter an opportunity to cross-examine them, and that hearsay is neither competent nor fair evidence against the accused."

In the case of *Svarney v. U. S.*, supra, the court said:

> "Deportation proceedings are in their nature civil. The rules of evidence need not be followed with the same strictness as in the courts. * * *
>
> However, even in such administrative proceedings, fundamental and essential rules of evidence

and of procedure must be observed. * * * But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the commissioners cannot act upon their own information as could jurors in primitive days.

All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. * * *

The right of cross-examination has long been firmly established in English-speaking countries. * * * Cross-examination is the right of the party against whom the witness is called, and the right is a valuable one as a means of separating hearsay from knowledge, error from truth, opinion from fact, and inference from recollection, * * * This court has in numerous cases and in various classes of litigation been insistent that such right should not be infringed. * * * But a fair and full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, and not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error'' (see cases cited).

In the case of *Bunji Une,* 41 Fed. (2) 239, the court said:

''Admittedly the examination of four Japanese witnesses was had in the absence of both petitioner and his counsel and without notice to either. * * * Furthermore, identification of petitioner was made by photograph. This, in the judg-

ment of the court, is a questionable proceeding, open to uncertainties, and does not rise to the standard of due process of law to which the petitioner, as well as all other inhabitants of the United States, is entitled, and the court is forced to the conclusion that the proceedings on which the order of deportation is based were unfair within the meaning of the law governing them" (see cases cited).

See also the case of *Gonzales v. Zurbrick,* 45 Fed. (2) 934 (C. C. A. 6th).

The statements of these five witnesses are quite fantastical. Three of them knew no name for the alien and the other two did not know him by the name by which the alien says he has always been known. It is shown that there were many East Indians, one thousand or more, in the locality in which these witnesses resided. They were shown a recent photograph of the present alien and pretended to identify it as that of a person they had last seen in Mexico some four or five years ago, notwithstanding the numerous East Indians they had seen during the period of time they claimed this alien was in Mexico and since, and the inevitable changes in features, appearance and dress during this lapse of time. Such identifications have been repeatedly held as insufficient evidence to warrant an order of deportation.

*Yee Et (Ep) v. U. S.,* 222 Fed. 66;
*Backus v. Owe Sam Goon,* 235 Fed. 847;
*White v. Tom Yuen,* 244 Fed. 739;
*Ex parte Bunji Une,* 41 Fed. (2) 239;

*Lee Mea Yong,* U. S. District Court, Northern District of California, No. 18,161, discharged by court on habeas corpus proceedings on ground that photographic identification was not sufficient.

Counsel for the alien on the grounds and under the decisions hereinbefore set forth, also moved to strike out and suppress the following ex parte statements based on photographic identification, and where the witnesses were not presented for cross-examination, viz.: statement of Pedro Gonzales taken at Westley, California, June 28, 1934, Government Exhibit "N" (Respondent's Exhibit "A", p. 119); statement of Manuel Velasco taken at Firebaugh, California, June 28, 1934, Government Exhibit "O" (Respondent's Exhibit "A", p. 122), and Government Exhibit "W" taken at Bridal Veil, Oregon, October 31, 1934 (Respondent's Exhibit "A", p. 134). Counsel also moved to strike out other documents, reports, certificates, letters, etc., which are not competent evidence in a proceeding of this kind, having been incorporated in the record in violation of the alien's rights and contrary to due process of law. It is apparent little or no attention was given to the alien's rights or what under the decision of the courts constitutes a fair hearing, in the presentation of evidence on the hearing before the immigration inspectors.

The alien has repeatedly and consistently stated that he first arrived in this country at Seattle, Washington, February 29, 1912, and that he was landed at said port March 4, 1912, and has ever since remained in the

United States. He gave a reasonably complete history of his movements in this country from the time of his admission in 1912 up to the present time. There is no competent evidence to contradict him on any point. He testified he worked for a short time in Seattle and then went to Portland, Oregon, where he worked in different lumber mills in that locality, and as a farm hand, up until 1924, having made at least two trips to California in the meantime. In May or June, 1924, he started to work for the American Smelting and Refining Company at the Garfield, Utah, plant, and worked there until about June, 1925, and again returned to Oregon and worked in the lumber mills. In 1927 and 1929 he worked for a Hindu named Sarain Singh, who had a contract with the Bridal Veil Lumber Company near Portland and was engaged in piling lumber, loading it on cars, etc. This work lasted until about October or November, 1929, when the mills closed down. He went back to California but did very little work in 1930 due to the depression. Commencing in January or February, 1931, he worked on a ranch near Yuba City, California, owned by The National Bank of Fresno. In 1932 and up to the present time he worked on a ranch for Donald Wilson, near Fowler, California.

The examining inspector (Respondent's Exhibit "A", p. 93) expresses the opinion that the alien left the United States a few years after his arrival and resided a number of years in Mexico. There is no basis for this opinion except the ex parte statements hereinbefore mentioned and which are not competent evi-

dence in this case. Some of these Mexicans identified the photograph of the alien as that of Tomas Singh or Tomas Juan, but the alien says he was never known by any name other than Thaman Singh and that he was never in Mexico. In this connection the inspector presented in evidence two checks, one endorsed by Tomas Singh and the other by Tomas Juan. A comparison of these two signatures with that of the present alien, Exhibit "X" (Respondent's Exhibit "A", p. 138), shows conclusively that he did not endorse said checks. It will also be noted that there were at least two other Thaman Singhs who had been in this country, one of them going to Mexico about 1920 or 1921. The inspector makes the statement that a Thaman Singh fraudulently secured return permits (Exhibits "G", Respondent's Exhibit "A", p. 106, and "R", Respondent's Exhibit "A", p. 126), and he expresses the opinion that he did so with the knowledge and assistance of the present alien. There is not a particle of evidence to support his opinion. On the contrary, the present alien denies all knowledge of it and says that if he had known this other alien was using his record, "I would have stopped it" (Respondent's Exhibit "A", p. 50).

The inspector also refers (Respondent's Exhibit "A", p. 94) to some certificates and other documents in connection with the alien's employment with the American Smelting & Refining Company at its Garfield, Utah, plant. These documents, of course, are not competent evidence. They are ex parte and the persons who made them were not cross-examined by

the alien's attorney and he had no opportunity to do so.

*Brader v. Zurbrick,* 38 Fed. (2) 472;
*Engel et al. v. Zurbrick,* 51 Fed. (2) 632.

The alien claims that he worked for this company at its Garfield, Utah, plant from May or June, 1924, until June, 1925, and presented a letter signed by H. A. Romney, an official of the company showing that Thaman Singh started to work at that plant as a laborer June 11, 1924, and quit May 21, 1925 (Alien's Exhibit "H", Respondent's Exhibit "A", p. 113). It would seem that there must have been two Thaman Singhs who worked at this plant as the government presented a communication from the same company (Government Exhibit "S", Respondent's Exhibit "A", p. 127) showing that one Thaman Singh worked at this plant from May 6, 1925, to May 8, 1925, and from November 24, 1925 to December 14, 1925. It will be noted that the alien's testimony is in substantial agreement with Exhibit "H" (Respondent's Exhibit "A" p. 113) and it will also be noted that these two Thaman Singhs did not work for this company at one and the same time except for two or three days, May 6th to 8th, 1925.

The inspector (Respondent's Exhibit "A", p. 94) then proceeds to do some conjecturing about a signature furnished by this company as that of a person who worked for it. These documents and reports of inspectors are not competent evidence. Besides, the signature is not proved and the person who presented it was not cross-examined and there is no proof as to where he got the signature, or that the company did

not have other signatures, some of which may have been of the present alien.

The inspector then discusses at some length (Respondent's Exhibit "A", p. 94) an aerial photograph (Government Exhibit "Z", Respondent's Exhibit "B") and the failure of alien to identify the location. In view of all the facts the matter seems more than frivolous. There is no competent proof that this aerial photograph does represent the Garfield plant. The alien never saw this plant from the air and a view of the entire plant from the air doubtless appears quite different from seeing one side of it at a time from the ground. Besides, the alien has not seen this plant for about ten years and there may have been many changes in the meantime. In fact, there may have been so many changes that the alien might not recognize the place if he were to return there.

The inspector (Respondent's Exhibit "A", p. 95) says that no record could be found of the alien's employment at the Bridal Veil Lumber Company nor could any one be found who could identify his photograph. These reports and certificates are not competent evidence, and the persons who made them were not cross-examined.

*Brader v. Zurbrick,* supra, and
*Engel v. Zurbrick,* supra.

It is not likely that there would be any record of this alien's employment on the books of the company as he did not work for the company but for Sarain Singh, who had a contract with this company and who paid the alien. Sarain Singh's name was found in the company's records. As to the failure of any one to iden-

tify the photograph of the alien, there does not appear to be but one person now employed by the company who was there at the time this alien worked at said place, and the indications are that this man was somewhat irrational.

The alien was an itinerant laborer from the time of his admission until the year 1932, when he secured a job with Donald Wilson, rancher, and his present employer, living near Fowler, California. The constant shifting of employment, due to the seasonal work that he followed, and the fact that the record thereof was invariably kept by Hindu bosses, makes proof on his part of continuous residence extremely difficult. However, the fact that he was lawfully residing in the United States, makes the claim that he left voluntarily therefrom preposterous, for the reason that no alien, once within the portals of this promised land, ever leaves the United States without the legal right to return thereto having been first obtained from the proper authorities.

It is respectfully submitted that the judgment of the lower court should be reversed, with directions to issue the writ as prayed for, either for a trial upon the merits before the lower court, or to discharge the appellant from custody.

Dated, San Francisco, California,
April 1, 1936.

Respectfully submitted,
JOSEPH P. FALLON,
*Attorney for Appellant.*